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Supreme Court of the United States

OCTOBER TERM, 1963

FRANK L. MEEKS, *Petitioner*,

v.

GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Question Presented	1
Statement	2
Reasons for Denying the Writ	5
Conclusion	10

INDEX TO AUTHORITIES

Brady v. *Southern Ry.*, 320 U.S. 476 (1943) 3
Gallick v. *Baltimore & O. R.R.*, 372 U.S. 108 (1963) 7, 9
Lavender v. *Kurn*, 327 U.S. 645 (1946) 7
Moore v. *Chesapeake & O. Ry.*, 340 U.S. 573 (1951) 7
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) 10
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 9

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QUESTION PRESENTED

Whether a railroad is liable under the Federal Employers Liability Act to an employee who affirmatively testifies that he is unable to say which of three events was responsible for aggravating pre-existing back trouble, where at least one of the events occurred solely by the employee's own choice and without any negligence whatever on the part of the railroad, and where no harm of the kind suffered by the employee could have been foreseen by the railroad from the conditions associated with the other two events.

STATEMENT

Petitioner, a brakeman in respondent's employ, suffered an aggravation of a pre-existing back condition during a switching operation at a concrete pipe plant in Georgia. The following are the facts, stated most favorably to petitioner and resolving all conflicts in his favor, that appear from the evidence in petitioner's action against respondent under the Federal Employers Liability Act:

On March 6, 1960, petitioner was a member of the crew of a local freight train operating between Valdosta and Macon, Georgia. (R. 30). The train was to stop just south of Tifton, Georgia, to leave a car of cement on an industrial track serving a plant there. (R. 30-31). In order to carry out his duties connected with the placement of the car petitioner dismounted from the engine. He did so while the train, being decelerated in the ordinary way for the stop, was traveling 10 to 15 miles an hour (R. 32), a lawful speed.[1] Petitioner made the choice to drop from the engine when he did because, based on his experience, he decided it was safe to do so at that point (R. 44-45), even though the usual speed for dismounting is 5 to 10 miles an hour (R. 32). If he had waited until the train was at a complete stop, he would have had to walk back along the track two or three car lengths to be where he had to be to perform the first of his duties. (R. 32). Petitioner, having dropped off when he did, had to run about thirty feet along the right of way to keep his balance. (R. 32, 42). There was no level pathway. (R. 31). Petitioner did not fall (R. 32),

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[1] The engineer testified that the train was going between 8 and 10 miles an hour. (R. 96).

and he did not say that he stumbled or otherwise strained himself on any of the rocks in the ballast along the track.

Petitioner's first duty was to uncouple the car that was to be placed on the industrial track from the car immediately behind it in the train. This he did (R. 32-33), and he then threw the switch and went to remove a derailer from the side track as the engineer moved to put the desired car in position for placement on that track (R. 33). A derailer is a piece of metal resting on top of the rail of a side track some distance back from the switch point. It prevents cars on the siding from rolling out on to the main line.[2] When a car is being placed on the siding the derailer must be temporarily removed. Petitioner found that he had to get into an inconvenient position and exert more pressure than was ordinarily required in order to remove the derailer on this occasion. (R. 34, 36). The derailer did not seem to be well conditioned or lubricated; to the best of petitioner's knowledge it had not been properly maintained for six months. (R. 35).

Petitioner next had to uncouple the cement car from the car immediately ahead of it in the train and spot it on the side track. After this was done he placed a chock under a wheel to keep it from rolling, and, because cement and other material that had spilled in the past had piled up in the area around the track, he had to get into an awkward position in order to place the chock. (R. 35-36). Finally, petitioner replaced the derailer in position and locked it and then recoupled the two parts of the train. (R. 36).

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[2] See Brady v. Southern Ry., 320 U.S. 476, 478 n.2. (1943).

As petitioner was walking back to the engine he felt pains in his back. (R. 37). The condition grew worse, and in September 1961 a spinal fusion operation was performed on petitioner. (R. 37-38, 76-79).

By petitioner's statement one of three events that he attributed to respondent's negligence—the running he did to keep his balance after dropping from the train, the unusual effort he expended to remove the derailer or the awkward posture he assumed to place the chock—caused the injury to his back. He testified that he did not know which of the three it was. (R. 155). Nor did he give any reason for what he professed was his knowledge that it was one of these three and not some other thing such as uncoupling and coupling cars that he had also done in the five minutes in which he was engaged in performing his duties near Tifton.[3] Petitioner had had trouble with his back previously (R. 39-40, 56, 65, 104-05, 109-10, 150-51), and the doctor who performed the operation on petitioner believed, on the basis of petitioner's history and his observation, that some quite normal, everyday strain or slight mishap could have caused the aggravation of his condition that petitioner experienced (R. 79-82)—although, of course, the greater the strain, the greater the likelihood of aggravation (R. 82).

A jury in the Tift County, Georgia, Superior Court returned a verdict for petitioner. (R. 26). Respondent's motion for judgment notwithstanding the verdict was denied, as was its motion for a new trial on grounds unrelated to the sufficiency of the evidence. (R. 29). Judgment was entered for petitioner. (R. 26).

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[3] There was testimony by two others in the crew that petitioner told them at the time that he thought he had stumbled on a rock while engaged in coupling. (R. 96, 149-50).

On appeal, the Georgia Court of Appeals reversed. (Pet. App. 33). It held that there was no evidence that respondent was negligent, or that, if it was negligent, its negligence caused petitioner's injury. The court in its opinion discussed the controlling decisions of this Court under the FELA, recognizing that under those decisions courts are not to seach out evidence contrary to the evidence on which a jury might properly base a verdict for the plaintiff and are not to reweigh the evidence and set aside a jury verdict on the ground that they would have decided the case differently. The Court of Appeals did not reach the questions of law raised in respondent's motion for a new trial and preserved on its appeal. Those questions would remain open if this Court disagreed with the court below on the lack of evidence and reversed on that point. The Supreme Court of Georgia denied a writ of certiorari. (Pet. App. 49).

REASONS FOR DENYING THE WRIT

This is not a case in which a state court has ignored or obdurately declined to follow the controlling decisions of this Court concerning the evidentiary showing a plaintiff must make to reach the jury in an FELA case. The Georgia Court of Appeals cited, discussed and recognized the controlling force of this Court's FELA decisions. It simply held that in light of the principles established by those decisions the petitioner's case was not one on which a jury could reasonably find the respondent liable and therefore the respondent's motion for judgment notwithstanding the verdict should have been granted. In so holding the court below was clearly correct, and there is no occasion for further review by this Court.

Petitioner's testimony was that the immediate pain in his back and the subsequent troubles with his back were caused by one of three events—coincidentally the three events of several that occurred during the approximately five minutes of switching in which his back was hurt that he had alleged in his complaint as negligence. This testimony was the only affirmative evidence as to a causal relationship between things respondent arguably did or permitted to exist and petitioner's injury. Petitioner was unable to say any more than that. His testimony was that "I do not know which of the three was the cause of my injury . . .." (R. 155).[4]

In these circumstances it was necessary, if petitioner was to carry his burden of proving respondent liable, that he show at least that respondent's negligence was responsible for all three of the events of which one was by his account to blame for his injury. For in this case all the possibilities respecting causation arose from the same evidence, the testimony of petitioner. No process of reasoning, no application of the jurors' wisdom drawn from their experience of life—nothing indeed except the sheerest speculation—could enable the jury to choose one of these possibilities to the ex-

[4] Nor did petitioner explain how, unable to identify any particular incident as the cause of his injury, he nevertheless knew it was one of the three events he named and not something else that he had done or that had happened to him during the critical period. On the medical testimony it was quite possible that some everyday strain such as might be involved in coupling or uncoupling cars of the train could have been the causal aggravating factor. Moreover, petitioner's testimony as to causation, such as it was, was an afterthought, presented on rebuttal in apparent response to testimony that petitioner had told fellow crew members contemporaneously that he had stumbled on a rock as he was coupling.

clusion of the others. *Cf. Moore* v. *Chesapeake & O. Ry.*, 340 U.S. 573, 576 (1951). In this the case is altogether unlike *Lavender* v. *Kurn*, 327 U.S. 645 (1946), and *Gallick* v. *Baltimore & O.R.R.*, 372 U.S. 108 (1963), where this Court held that juries in FELA cases must be allowed to choose among different possible inferences or theories as to causation presented on the evidence. Here there was a single theory and no basis on which to prefer one possible inference to another. The Court in *Lavender* v. *Kurn* made clear that, while it would not do for a defendant merely to assert that a jury's verdict in favor of a plaintiff "involved speculation and conjecture," a jury's decision that an employer was negligent and the negligence contributed to its employee's injury must be susceptible to rational justification. 327 U.S. at 653. This will continue to be so as long as liability under the FELA is dependent on negligence, and the statute is not effectively a workmen's compensation act under which a jury assesses compensation without regard to any prescribed scale.

The petitioner did not carry the burden of proof that was his or provide the jury with a rational justification for the verdict it returned. To do that he must have shown that all three of the events to which he attributed his injury were the result of respondent's negligence. Rather, as the court below held, on the record made by petitioner the respondent was not negligent with respect to any of the three events. As for one—petitioner's dismounting from the train while it was still running—there is no basis in the record from which it can be inferred that respondent was in any way at fault. As for the conditions that led to the

other two incidents in which petitioner might have strained his back, respondent could not be found negligent on this record because on the reading of the evidence most favorable to petitioner harm of the kind suffered by him was not reasonably to be foreseen.

Petitioner's own testimony was that he alone decided the point at which he would drop off the engine in the vicinity of the place where the switching was to be done, and that he made the decision to drop off where he did because he thought it would be safe to do so. The train at that time, by petitioner's testimony, was going 10 to 15 miles an hour. There was no evidence that this was an unlawful or inherently improper or unsafe speed. Quite the contrary. The undisputed evidence was that, having decelerated to this speed at this point, the engineer was able to bring the train to a stop exactly where it was meant to stop. (R. 46, 96). There was evidence that a speed of 10 to 15 miles an hour was faster than customary for dismounting for a switch. But there was no evidence whatever that petitioner was, or believed himself to be, under any compulsion from any rule or practice, formal or informal, of respondent to drop off the engine where he did when the train was going at that speed. The only cost to the petitioner of waiting until the train came to a complete stop—let alone waiting only until it had slowed down to the ordinary dropping-off speed—would have been that he must walk back two or three car lengths, 90 to 135 feet, along the track to get to where he had to be to begin the switching operation. There is no evidence that respondent would have begrudged the petitioner the few seconds he might have

spent in thus walking less than half the length of a football field to reach his appointed duty post.[5]

The point here is not that petitioner was guilty of contributory negligence or that he voluntarily assumed a risk by dropping from the engine when he did, but rather that there is an utter lack of evidence that it was in any wise negligent on the part of respondent that the train, in the process of decelerating, should have been traveling at 10 to 15 miles an hour at the point where it was going at that speed. *Cf. Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943).

On this view and without regard to anything else respondent was entitled to judgment notwithstanding the verdict. As we have indicated, no jury could say in reason, or on any basis other than mere conjecture, that petitioner's injury more probably was caused by one of the two other incidents to which he attributed it than by his running to keep his balance after dropping to the ground from the engine of the train.

There is more, however. As the court below held, neither of the other two incidents involved negligence on the part of respondent because the harm suffered by petitioner was not reasonably to be foreseen from them. "[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick* v. *Baltimore & O.R.R.*, 372 U.S. 108, 117 (1963).

To be sure, overexertion on the part of an employee is a risk that may be reasonably foreseeable when an

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[5] Petitioner now emphasizes in this Court the condition of the ground around the track, but, as the court below found (Pet. App. 42), this is clearly irrelevant when there is a complete absence of evidence that petitioner stumbled or suffered any other mishap that might not have happened if he had been running along a level footpath to keep his balance.

employer creates or allows to persist some unusual conditions attending an employee's work. If petitioner's view of what the evidence showed is accepted, respondent had in use a derailer that was somewhat more difficult to remove from the rail than most other derailers and it allowed waste to accumulate so that the ground level near some tracks was built up. These conditions pose such negligible risks of harm to an employee working under them that respondent cannot rationally be held negligent on a record showing no more than the existence of such conditions.

In short, the proofs in this case did not "justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). The decision below that this was so merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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